



The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues

Kate M. Manuel
Legislative Attorney

John R. Luckey
Legislative Attorney

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Summary

Commonly known as the "8(a) Program," the Minority Small Business and Capital Ownership Development Program is one of several federal contracting programs for small businesses. The 8(a) Program provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-asides and sole-source awards. A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition. In FY2011, the federal government spent \$16.7 billion on contracts and subcontracts with 8(a) firms. Other programs provide similar assistance to other types of small businesses (e.g., women-owned, HUBZone).

Eligibility for the 8(a) Program is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States" that demonstrate "potential for success." Each of these terms is further defined by the Small Business Act, regulations promulgated by the Small Business Administration (SBA), and judicial and administrative decisions.

A "business" is generally a for-profit entity that has a place of business located in the United States and operates primarily within the United States or makes a significant contribution to the U.S. economy by paying taxes or using American products, materials, or labor. A business is "small" if it is independently owned and operated; is not dominant in its field of operations; and meets any definitions or standards established by the Administrator of Small Business. Ownership is "unconditional" when it is not subject to any conditions precedent or subsequent, executory agreements, or similar limitations. "Control" is not the same as ownership and includes both strategic policy setting and day-to-day administration of business operations.

Members of certain racial and ethnic groups are presumed to be socially disadvantaged, although individuals who do not belong to these groups may prove they are also socially disadvantaged. To be economically disadvantaged, an individual must have a net worth of less than \$250,000 (excluding ownership in the 8(a) firm and equity in one's primary residence) at the time of entry into the 8(a) Program. This amount increases to \$750,000 for continuing eligibility. In determining whether an applicant has good character, SBA looks for criminal conduct, violations of SBA regulations, or current debarment or suspension from federal contracting. For a firm to have demonstrated "potential for success," it generally must have been in business in the field of its primary industry classification for at least two years immediately prior to applying to the 8(a) Program. However, small businesses owned by Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are eligible for the 8(a) Program under somewhat different terms.

The 8(a) Program has periodically been challenged on the grounds that the presumption that members of certain racial and ethnic groups are disadvantaged violates the constitutional guarantee of equal protection. The outcomes in early challenges to the program varied, with some courts finding that plaintiffs lacked standing because they were not economically disadvantaged. Most recently, a federal district court found that the program is not unconstitutional on its face because "breaking down barriers to minority business development created by discrimination" constituted a compelling government interest, and the government had a strong basis in evidence for concluding that race-based action was necessary to further this interest. However, the court found that the program was unconstitutional as applied in the military simulation and training industry because there was no evidence of public- or private-sector discrimination in this industry.

Contents

Introduction.....	1
Historical Development	2
Origins of the 8(a) Program.....	2
Federal Programs for Small Businesses	2
Federal Programs for Minorities	3
1978 Amendments to the Small Business Act and Subsequent Regulations.....	4
Expansion of the 8(a) Program to Include "Disadvantaged" Groups.....	6
Current Requirements.....	7
Requirements In General.....	7
Eligibility for the 8(a) Program.....	7
Set-Asides and Sole-Source Awards Under Section 8(a)	11
Other Requirements.....	14
Requirements for Tribally, ANC-, NHO-, and CDC-Owned Firms	16
Eligibility for the 8(a) Program.....	16
Set-Asides and Sole-Source Awards	20
Other Requirements.....	20
Constitutionality of the 8(a) Program	21

Figures

Figure 1. Acquisition Methods at Various Price Thresholds.....	14
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Tables

Table 1. Groups Presumed to Be Socially Disadvantaged.....	5
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Appendixes

Appendix. Comparison of the Requirements Pertaining to 8(a) Businesses Generally, Tribally Owned Businesses, ANC-Owned Businesses, and Others.....	25
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Contacts

Author Contact Information.....	30
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Introduction

Commonly known as the "8(a) Program," the Minority Small Business and Capital Ownership Development Program is one of several federal contracting programs for small businesses.¹ The 8(a) Program provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-asides and sole-source awards. A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition. Eligibility for the 8(a) Program is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States" that demonstrate "potential for success." However, small businesses owned by Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are eligible for the 8(a) Program under somewhat different terms. In FY2011, the federal government spent \$16.7 billion on contracts and subcontracts with 8(a) firms.² Other programs provide similar assistance to other types of small businesses (e.g., women-owned, HUBZone).

The 8(a) and other programs for small businesses are of perennial interest to Congress, given that:

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.³

However, recent Congresses have had particular interest in the 8(a) Program because of the recession of 2007-2009,⁴ its effects on minority-owned small businesses,⁵ and small businesses' role in job creation.⁶

¹ See generally CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by Kate M. Manuel and Erika K. Lunder. The 8(a) Program takes its name from one of the sections of the Small Business Act that authorizes it. The program is also governed by Section 7(j) of the act.

² See Small Business Goaling Report: Fiscal Year 2011, available at https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2011.pdf. The report on FY2012 has not yet been compiled.

³ Small Business Act of 1958, P.L. 85-536, §2(a), 72 Stat. 384 (July 18, 1958) (codified at 15 U.S.C. §631(a)).

⁴ See, e.g., Phil Izzo, *Recession Over in June 2009*, *Wall Street J.*, September 20, 2010, available at <http://blogs.wsj.com/economics/2010/09/20/nber-recession-ended-in-june-2009/> (discussing the recession of 2007-2009).

⁵ See, e.g., Small Bus. Admin., *The Small Business Economy: A Report to the President 3* (2009), available at http://www.sba.gov/ADVO/research/sb_econ2009.pdf ("The credit freeze in the short-term funding market had a devastating effect on the economy and small firms."); John Rosenthal, *Tough Times Often Even Tougher on Minority Biz*, *Chicago Business*, November 30, 2009, available at <http://www.chicagobusiness.com/cgi-bin/mag/article.pl?articleId=32738&seenIt=1>.

⁶ See, e.g., Mark Trumbull, *Why Obama Job Creation Plan Focuses on Small Business*, *The Christian Science Monitor*, December 8, 2009, available at <http://features.csmonitor.com/politics/2009/12/08/why-obama-job-creation-plan-focuses-on-small-business> (noting that small businesses are reported to have created 65% of all new jobs in the United States over the past 15 years).

This report provides a brief history of the 8(a) Program, summarizes key requirements, and discusses legal challenges alleging that the program's presumption that members of certain racial and ethnic groups are socially disadvantaged violates the constitutional guarantee of equal protection. A separate report, CRS Report R42390, *Federal Contracting and Subcontracting with Small Businesses: Issues in the 112th Congress*, by Kate M. Manuel and Erika K. Lunder, discusses recently enacted or introduced legislation regarding the 8(a) Program.

Historical Development

Origins of the 8(a) Program

The current 8(a) Program resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist racial and ethnic minorities. This merger first occurred, as a matter of executive branch practice, in 1967 and was given a statutory basis in 1978.

Federal Programs for Small Businesses

Congress first authorized a federal agency to enter into prime contracts with other agencies and subcontract with small businesses for the performance of these contracts in 1942. The agency was the Smaller War Plants Corporation (SWPC), which was created partly for this purpose, and Congress gave it these powers in order to ameliorate small businesses' financial difficulties while also "mobiliz[ing] the productive facilities of small business in the interest of successful prosecution of the war."⁷ The SWPC's subcontracting authority expired along with the SWPC at the end of the World War II. However, in 1951, at the start of the Korean War, Congress created the Small Defense Plants Administration (SDPA), which was generally given the same powers that the SWPC had exercised.⁸ Two years later, in 1953, Congress transferred the SDPA's subcontracting authorities, among others, to the newly created Small Business Administration,⁹ with the intent that the SBA would exercise these powers in peacetime, as well as in wartime.¹⁰ When the Small Business Act of 1958 transformed the SBA into a permanent independent agency, this subcontracting authority was included in Section 8(a) of the act.¹¹ At its inception, the SBA's subcontracting authority was not limited to small businesses owned and controlled by the socially and economically disadvantaged. Under the original Section 8(a), the SBA could contract with any "small-business concerns or others,"¹² but the SBA seldom, if ever, employed this subcontracting authority, focusing instead upon its loan and other programs.¹³

⁷ Small Business Mobilization Act, P.L. 77-603, §4(f), 56 Stat. 351 (June 11, 1942).

⁸ Act of July 31, 1951, P.L. 82-96, §110, 65 Stat. 131.

⁹ P.L. 83-163, §207(c)-(d), 67 Stat. 230 (July 30, 1953).

¹⁰ See, e.g., H.Rept. 494, 83rd Cong., 1st sess., at 2 (1953) (stating that the SBA would "continue many of the functions of the [SDPA] in the present mobilization period and in addition would be given powers and duties to encourage and assist small-business enterprises in peacetime as well as in any future war or mobilization period"); S.Rept. 1714, 85th Cong., 2nd sess., at 9-10 (1958) (stating that the act would "put[] the procurement assistance program on a peacetime basis").

¹¹ P.L. 85-536, §8(a)(1)-(2), 72 Stat. 384 (July 18, 1958).

¹² *Id.*

¹³ Thomas Jefferson Hasty, III, *Minority Business Enterprise Development and the Small Business Administration's* (continued...)

Federal Programs for Minorities

Federal programs for minorities began developing at approximately the same time as those for small businesses, although there was initially no explicit overlap between them. The earliest programs were created by executive orders, beginning with President Franklin Roosevelt's order on June 25, 1941, requiring that all federal agencies include a clause in defense-related contracts prohibiting contractors from discriminating on the basis of race, creed, color, or national origin.¹⁴ Subsequent Presidents followed Roosevelt's example, issuing a number of executive orders seeking to improve the employment opportunities of "Negroes, Spanish-Americans, Orientals, Indians, Jews, Puerto Ricans, etc."¹⁵ These executive branch initiatives took on new importance after the Kerner Commission's report on the causes of the urban riots of 1966 concluded that African Americans would need "special encouragement" to enter the economic mainstream.¹⁶

Presidents Lyndon Johnson and Richard Nixon laid the foundations for the present 8(a) Program in the hope of providing such "encouragement." Johnson created the President's Test Cities Program (PTCP), which involved a small-scale use of the SBA's authority under Section 8(a) to award contracts to firms willing to locate in urban areas and hire unemployed individuals, largely African Americans, or sponsor minority-owned businesses by providing capital or management assistance.¹⁷ However, under the PTCP, small businesses did not have to be minority-owned to receive subcontracts under Section 8(a).¹⁸ Nixon's program was larger and focused more specifically on minority-owned small businesses.¹⁹ During the Nixon Administration, the SBA promulgated its earliest regulations for the 8(a) Program. In 1970, the first of these regulations articulated the SBA's policy of using Section 8(a) to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."²⁰ A later regulation, promulgated in 1973, defined "disadvantaged persons" as including, but not limited to, "black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts."²¹ However, the SBA lacked explicit statutory authority for focusing its 8(a) Program on minority-owned businesses until 1978,²² although courts

(...continued)

8(a) Program: Past, Present, and (Is There a) Future? 145 *Mil. L. Rev.* 1, 8 (1994) ("[B]ecause the SBA believed that the efforts to start and operate an 8(a) program would not be worthwhile in terms of developing small business, the SBA's power to contract with other government agencies essentially went unused. The program actually lay dormant for about fifteen years until the racial atmosphere of the 1960s provided the impetus to wrestle the SBA's 8(a) authority from its dormant state.").

¹⁴ Exec. Order No. 8802, 6 *Federal Register* 3,109 (June 25, 1941). Similar requirements were later imposed on non-defense contracts. See Exec. Order No. 9346, 8 *Federal Register* 7,182 (May 29, 1943).

¹⁵ See, e.g., Exec. Order No. 10308, 16 *Federal Register* 12,303 (December 3, 1951) (Truman); Exec. Order No. 10557, 19 *Federal Register* 5,655 (September 3, 1954) (Eisenhower); Exec. Order No. 10925, 26 *Federal Register* 1,977 (March 6, 1961) (Kennedy); Exec. Order No. 11458, 34 *Federal Register* 4,937 (March 7, 1969) (Nixon).

¹⁶ *Report of the National Advisory Commission on Civil Disorders* 21 (1968).

¹⁷ See, e.g., Hasty, *supra* note 13, at 11-12.

¹⁸ See, e.g., Jonathan J. Bean, *Big Government and Affirmative Action: The Scandalous History of the Small Business Administration* 66 (2001).

¹⁹ See Exec. Order No. 1625, 36 *Federal Register* 19,967 (October 13, 1971).

²⁰ 13 C.F.R. §124.8-1(b) (1970).

²¹ 13 C.F.R. §124.8(c) (1973).

²² S. Rep. No. 95-1070, 95th Cong., 2nd sess., at 14 (1978) ("One of the underlying reasons for the failure of this effort is that the program has no legislative basis."); H.Rept. 95-949, 95th Cong., 2nd sess., at 4 (1978) ("Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations... [The] program is not as successful as it could be.").

generally rejected challenges alleging that SBA's implementation of the program was unauthorized because it was "not specifically mentioned in statute."²³

1978 Amendments to the Small Business Act and Subsequent Regulations

In 1978, Congress amended the Small Business Act to give the SBA statutory authority for its 8(a) Program for minority-owned businesses.²⁴ Under the 1978 amendments, SBA can only subcontract under Section 8(a) with "socially and economically disadvantaged small business concerns,"²⁵ or businesses which are least 51% owned by one or more socially and economically disadvantaged individuals and whose management and daily operations are controlled by such individual(s).²⁶

The 1978 amendments established a basic definition of "socially disadvantaged individuals," which included those who have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."²⁷ They also included congressional findings that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are socially disadvantaged.²⁸ Thus, if an individual was a

²³ See, e.g., *Ray Billie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 703-04 (5th Cir. 1973). In this case, the court particularly noted that the SBA's program was supported by congressional and presidential mandates issued after enactment of the Small Business Act in 1958. *Id.* at 705.

²⁴ P.L. 95-507, 92 Stat. 1757 (October 24, 1978).

²⁵ *Id.* at §202.

²⁶ *Id.* (codified at 15 U.S.C. §637(a)(4)(A)-(B)). Firms that are owned and controlled by Indian tribes, ANCs, or NHOs were later included within the definition of a "socially and economically disadvantaged small business concern." See *infra* notes 36-43 and accompanying text.

²⁷ *Id.* (codified at 15 U.S.C. §637(a)(5)).

²⁸ *Id.* at §201 (codified at 15 U.S.C. §631(f)(1)(C)). The meaning of "socially disadvantaged individuals" was the subject of much debate at the time of the 1978 amendments. Some Members of Congress, perhaps focusing on the SBA's use of its authority under §8(a) in 1968-1970, viewed the 8(a) Program as a program for African Americans and would have defined "social disadvantage" accordingly. See, e.g., Parren J. Mitchell, *Federal Affirmative Action for MBE's: An Historical Analysis*, 1 *Nat'l Bar Ass'n Mag.* 46 (1983). Mitchell was a Member of the U.S. House of Representatives and leader of the Black Caucus when the 1978 amendments were enacted. Others favored a somewhat broader view, including both African Americans and Native Americans on the grounds that only those who did not come to the United States seeking the "American dream" should be deemed socially disadvantaged. See, e.g., *Testimony Before the House Comm. on Small Bus., Subcomm. on General Oversight & Minority Enter., Task Force on Minority Enter.*, 96th Cong., at 21 (1979). Yet others suggested that groups that are not racial or ethnic minorities should be able to qualify as "socially disadvantaged," or that individuals ought to be able to prove they are personally socially disadvantaged even if they are not racial or ethnic minorities. See, e.g., H.Rept. 95-949, 95th Cong., 2nd sess., at 9 (1978) ("[T]he committee intends that the SBA give most serious consideration to, among others, women business owners" when determining which groups are socially disadvantaged.... [T]he bill does recognize that persons falling outside of the racial and ethnic groups presumed to be disadvantaged, may nevertheless be disadvantaged."). The bill that passed the House defined "socially disadvantaged individuals," in part, by establishing a rebuttable presumption that African Americans and Hispanic Americans are socially disadvantaged, while the bill that passed the Senate did not reference any racial or ethnic groups in defining "social disadvantage." See, e.g., H.R. Conf. Rep. No. 95-1714, 95th Cong., 2nd sess., at 20 (1978); S.Rept. 95-1070, 95th Cong., 2nd sess., at 13-16 (1978). The conference committee reconciling the House and Senate versions ultimately arrived at a definition of "socially disadvantaged individuals" that was broader than the definition used in the SBA's 1973 regulation and included "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group." P.L. 95-507, at §202. This definition did not incorporate the rebuttable presumption that members of certain groups are socially disadvantaged included in the House bill. However, the conference bill included congressional findings that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are socially disadvantaged, thereby arguably achieving similar effect. *Id.* at §201.

member of one of these groups, he or she was presumed to be socially disadvantaged. Otherwise, the amendments granted the SBA broad discretion to recognize additional groups or individuals as socially disadvantaged based upon criteria promulgated in regulations.²⁹ Under these regulations, which include a three-part test for determining whether minority groups not mentioned in the amendment's findings are disadvantaged,³⁰ the SBA recognized the racial or ethnic groups listed in **Table 1** as socially disadvantaged for purposes of the 8(a) Program.³¹ The regulations also established standards of evidence to be met by individuals demonstrating personal disadvantage and procedures for rebutting the presumption of social disadvantage accorded to members of recognized minority groups.³²

Table 1. Groups Presumed to Be Socially Disadvantaged

Group	Countries of Origin Included Within Group
Black Americans	n/a
Hispanic Americans	n/a
Native Americans (including American Indians, Eskimos, Aleuts, Native Hawaiians)	n/a
Asian Pacific Americans	Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia, Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru
Subcontinent Asian Americans	India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, Nepal

Source: Congressional Research Service, based on 13 C.F.R. §124.103(b).

The 1978 amendments also defined “economically disadvantaged individuals,” for purposes of the 8(a) Program, as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired ... as compared to others in the same business area who

²⁹ P.L. 95-507, at §202 (granting the SBA’s Associate Administrator for Minority Small Business and Capital Ownership Development authority to make determinations regarding which other groups are socially disadvantaged); H.Rept. 95-949, *supra* note 28, at 9 (expressing the view that Sections 201 and 202 of the bill provide “sufficient discretion ... to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social ... disadvantage”).

³⁰ See 13 C.F.R. §124.103(d)(2)(i)-(iii)(1980).

³¹ 13 C.F.R. §124.103(b). Different groups are sometimes recognized as socially disadvantaged for purposes of other programs, such as those of the Department of Commerce’s Minority Business Development Agency (MBDA). See 15 C.F.R. §1400.1(a). The SBA has rejected petitions from certain groups, including Hasidic Jews, women, disabled veterans, and Iranian-Americans. See, e.g., George R. La Noue & John C. Sullivan, Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences, 41 *Santa Clara L. Rev.* 103, 127-29 (2000). However, Hasidic Jews are eligible to receive assistance from the MBDA, while women are deemed to be disadvantaged for purposes of the Department of Transportation’s Disadvantaged Business Enterprise (DBE) program. See 49 U.S.C. §47113(a)(2) (DBE program); 15 C.F.R. §1400.1(c) (MBDA program).

³² 13 C.F.R. §124.103(c)(2) (standards of evidence for showing personal disadvantage); 13 C.F.R. §124.103(b)(3) (mechanisms for rebutting the presumption of social disadvantage).

are not socially disadvantaged.”³³ Later, the SBA established by regulation that personal net worth of less than \$250,000 at the time of entry into the 8(a) Program (\$750,000 for continuing eligibility) constitutes economic disadvantage.³⁴

Expansion of the 8(a) Program to Include “Disadvantaged” Groups

Although the 8(a) Program was originally established for the benefit of disadvantaged *individuals*, in the 1980s, Congress expanded the program to include small businesses owned by four “disadvantaged” *groups*.

The first owner-group to be included was Community Development Corporations (CDCs). A CDC is:

a nonprofit organization responsible to residents of the area it serves which is receiving financial assistance under part 1 [42 USCS §§9805 et seq.] and any organization more than 50 percent of which is owned by such an organization, or otherwise controlled by such an organization, or designated by such an organization for the purpose of this subchapter [42 USCS §§9801 et seq.].³⁵

Congress created CDCs with the Community Development Act of 1981³⁶ and instructed the SBA to issue regulations ensuring that CDCs could participate in the 8(a) Program.³⁷

In 1986, two additional owner-groups, Indian tribes and Alaska Native Corporations, became eligible for the 8(a) Program when Congress passed legislation providing that firms owned by Indian tribes, which included Alaskan Native Corporations (ANCs),³⁸ were to be deemed “socially disadvantaged” for purposes of the 8(a) Program.³⁹ In 1992, ANCs were further deemed to be “economically disadvantaged.”⁴⁰

³³ P.L. 95-507, §202.

³⁴ 13 C.F.R. §124.104(c)(2). Some commentators estimate that 80 to 90% of Americans are economically disadvantaged under the SBA’s net-worth requirements. *See, e.g.,* La Noue & Sullivan, *supra* note 31, at 108.

³⁵ 42 U.S.C. §9802.

³⁶ P.L. 97-35, Ch. 8, Subch. A, 95 Stat. 489 (1981) (codified at 42 U.S.C. §§9801 et seq.).

³⁷ *Id.* at §626, 95 Stat. 496 (codified at 42 U.S.C. §9815).

³⁸ P.L. 99-272, §18015, 100 Stat. 370 (1986) (codified at 15 U.S.C. §637(a)(13)) (defining “Indian tribe” to include “any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act (43 U.S.C. §1606)) which—(A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or (B) is recognized as such by the State in which such tribe, band, nation, group, or community resides.”). An Alaska Native Corporation is “any Regional Corporation, Village Corporation, Urban Corporation or Group Corporation organized under laws of Alaska in accordance with the Alaska Native Claims Settlement Act.” 13 C.F.R. §124.3. An Alaska Native is any “citizen of the United States who is a person of one-fourth degree or more Alaskan Indian ..., Eskimo, Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.” 13 C.F.R. §124.3.

³⁹ P.L. 99-272, §18015, 100 Stat. 370 (codified at 15 U.S.C. §637(a)(4)).

⁴⁰ P.L. 102-415, §10, 106 Stat. 2115 (1992) (codified at 43 U.S.C. §1626(e)).

The final owner-group, that of Native Hawaiian Organizations (NHOs), was recognized in 1988.⁴¹ An NHO was defined as:

any community service organization serving Native Hawaiians in the State of Hawaii which—(A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer Affairs, or any successor agency, (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.⁴²

Current Requirements

Under the current 8(a) Program, participating firms are eligible for set-asides or sole-source awards of federal contracts, as well as training and technical assistance from SBA. Detailed statutory and regulatory requirements govern eligibility for the Program; set-asides and sole-source awards to 8(a) firms; and related issues. These requirements are generally the same for all participants in the 8(a) Program, although there are instances where there are "special rules" for 8(a) firms owned by groups.⁴³ An **Appendix** compares the requirements applicable to individual owners of 8(a) firms to those applicable to groups owning 8(a) firms (i.e., Alaska Native Corporations, Indian tribes, Native Hawaiian Organizations, and Community Development Corporations).⁴⁴

Requirements In General

Eligibility for the 8(a) Program

Eligibility for the 8(a) Program is limited to "small business[es] which [are] unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrate[] potential for success."⁴⁵ Each of these terms is further defined by the Small Business Act; regulations that the SBA has promulgated to implement Section 8(a); and judicial and administrative decisions.⁴⁶ The eligibility requirements are the same at the time of entry into the 8(a) Program and throughout the Program unless otherwise noted.⁴⁷

⁴¹ P.L. 100-656, §207, 102 Stat. 3861 (1988) (codified at 15 U.S.C. §637(a)(4)).

⁴² *Id.* (codified at 15 U.S.C. §637(a)(15)). A "Native Hawaiian" is "any individual whose ancestors were natives, prior to 1778, of the area which now comprises the state of Hawaii." 13 C.F.R. §124.3.

⁴³ *See, e.g.*, 13 C.F.R. §124.109(a) ("Special rules for ANCs. Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in §124.112 to the extent the criteria are not inconsistent with this section.") (emphasis in original).

⁴⁴ *See also* CRS Report R40855, *Contracting Programs for Alaska Native Corporations: Historical Development and Legal Authorities*, by Kate M. Manuel, John R. Luckey, and Jane M. Smith (discussing contracting with ANC-owned firms through the 8(a) Program and other programs).

⁴⁵ 13 C.F.R. §124.101. The Office of Legal Counsel at the Department of Justice has opined that SBA regulations limiting eligibility for the 8(a) Program to citizens do not deprive resident aliens of due process in violation of the Fifth Amendment to the U.S. Constitution. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Constitutionality of 13 C.F.R. §124.103 Establishing Citizenship Requirement for Participation in 8(a) Program*, March 4, 1996, available at <http://www.justice.gov/olc/sba8.htm>.

⁴⁶ The SBA's Office of Hearings and Appeals has, for example, developed a seven-part test for determining whether a (continued...)

"Business"

Except for small agricultural cooperatives, a "business" is a for-profit entity that has a place of business located in the United States and operates primarily within the United States or makes a significant contribution to the U.S. economy by paying taxes or using American products, materials, or labor.⁴⁸ For purposes of the 8(a) Program, businesses may take the form of individual proprietorships, partnerships, limited liability companies, corporations, joint ventures, associations, trusts, or cooperatives.⁴⁹

"Small"

A business is "small" if it is independently owned and operated; is not dominant in its field of operations; and meets any definitions or standards established by the Administrator of the SBA.⁵⁰ These standards focus primarily upon the size of the business as measured by the number of employees or its gross income, but they also take into account the size of other businesses within the same industry.⁵¹ For example, businesses in the field of "scheduled passenger air transportation" are "small" if they have fewer than 1,500 employees, while those in the data processing field are "small" if they have a gross income of less than \$25 million.⁵²

Affiliations between businesses, or relationships allowing one party control or the power of control over another,⁵³ generally count in size determinations, with the SBA considering "the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit."⁵⁴ Businesses can thus be determined to be other than small because of their involvement in joint ventures,⁵⁵ subcontracting arrangements,⁵⁶ or franchise or license agreements,⁵⁷ among other

(...continued)

small business is "unusually reliant" on a contractor that is used in determining affiliation. *See* Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996).

⁴⁷ *See* 13 C.F.R. §124.112 (a) ("In order for a concern ... to remain eligible for 8(a) ... program participation, it must continue to meet all eligibility criteria contained in [Section] 124.101 through [Section] 124.108.")

⁴⁸ 13 C.F.R. §121.105(a)(1). "Business" is separately defined for small agricultural cooperatives. *See* 13 C.F.R. §121.105(a)(2).

⁴⁹ 13 C.F.R. §121.105(b).

⁵⁰ 15 U.S.C. §632(a)(1)-(2)(A).

⁵¹ 13 C.F.R. §§121.101-121.108. The number of employees is the average of each pay period for the preceding twelve calendar months. Gross income is based on the average for the last three completed fiscal years. It includes all revenues, not just those from the firm's primary industry. *See* IMDT, Inc., SBA-4121 (1995).

⁵² 13 C.F.R. §121.201.

⁵³ 13 C.F.R. §121.103(a)(1). Control, or the power of control, need only exist. It need not be exercised for affiliation to be found.

⁵⁴ 13 C.F.R. §121.103(a)(6).

⁵⁵ 13 C.F.R. §121.103(h) ("[A] specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes.")

⁵⁶ 13 C.F.R. §121.103(h)(4) ("A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant.")

⁵⁷ 13 C.F.R. §121.103(i) ("Affiliation may arise ... through ... common ownership, common management or excessive (continued...)")

things, provided that their income or personnel numbers, plus those of their affiliate(s), are over the pertinent size threshold.

"Unconditionally owned and controlled"

Participants in the 8(a) Program must be "at least 51% unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States" unless they are owned by an Indian tribe, Alaska Native Corporation (ANC), Native Hawaiian Organization (NHO), or Community Development Corporation (CDC).⁵⁸ Ownership is "unconditional" when it is not subject to any conditions precedent or subsequent, executory agreements, voting trusts, restrictions on assignment of voting rights, or other arrangements that could cause the benefits of ownership to go to another entity.⁵⁹ Ownership is "direct" when the disadvantaged individuals own the business in their own right and not through an intermediary (e.g., ownership by another business entity or by a trust that is owned and controlled by one or more disadvantaged individuals).⁶⁰ Non-disadvantaged individuals and non-participant businesses that own at least 10% of an 8(a) business may generally own no more than 10 to 20% of any other 8(a) firm.⁶¹ Non-participant businesses that earn the majority of their revenue in the same or similar line of business are likewise barred from owning more than 10 to 20% of another 8(a) firm.⁶²

Participants must also be controlled by one or more disadvantaged individuals.⁶³ "Control is not the same as ownership" and includes both strategic policy setting and day-to-day management and administration of business operations.⁶⁴ Management and daily business operations must also be conducted by one or more disadvantaged individuals unless the 8(a) business is owned by an Indian tribe, ANC, NHO, or CDC.⁶⁵ These individuals must have managerial experience "of the extent and complexity needed to run the concern" and generally must devote themselves full-time to the business "during the normal working hours of firms in the same or similar line of business."⁶⁶ A disadvantaged individual must hold the highest officer position within the business.⁶⁷ Non-disadvantaged individuals may otherwise be involved in the management of an 8(a) business, or may be stockholders, partners, limited liability members, officers, or directors of

(...continued)

restrictions on the sale of the franchise interest.").

⁵⁸ 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring at least 51% unconditional ownership); 13 C.F.R. §124.105.

⁵⁹ 13 C.F.R. §124.3.

⁶⁰ 13 C.F.R. §124.105(a).

⁶¹ 13 C.F.R. §124.105(h)(1). Ownership is limited to 10% when the 8(a) firm is in the "developmental stage" of the 8(a) Program and 20% when it is in the "transitional stage." *Id.* For more on the developmental and transitional stages, see *infra* notes 109-111 and accompanying text.

⁶² 13 C.F.R. §124.105(h)(2).

⁶³ 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring control of management and daily business operations); 13 C.F.R. §124.106.

⁶⁴ 13 C.F.R. §124.106.

⁶⁵ *Id.*

⁶⁶ 13 C.F.R. §124.106(a)(3).

⁶⁷ 13 C.F.R. §124.106(a)(2).

an 8(a) business.⁶⁸ However, they may not exercise actual control or have power to control, or receive compensation greater than that of the highest-paid officer without SBA approval.⁶⁹

"Socially disadvantaged individual"

Socially disadvantaged individuals are "those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities."⁷⁰ Members of designated groups, listed in **Table 1**, are entitled to a rebuttable presumption of social disadvantage for purposes of the 8(a) Program,⁷¹ although this presumption can be overcome with "credible evidence to the contrary."⁷² Individuals who are not members of designated groups must prove they are socially disadvantaged by a preponderance of the evidence.⁷³ Such individuals must show (1) at least one objective distinguishing feature that has contributed to social disadvantage (e.g., race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from mainstream American society); (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world.⁷⁴ In assessing the third factor, the SBA will consider all relevant evidence produced by the applicant, but must consider the applicant's education, employment, and business history to see if the totality of the circumstances shows disadvantage.⁷⁵ Groups not included in **Table 1** may obtain listing by demonstrating disadvantage by a preponderance of the evidence.⁷⁶

"Economically disadvantaged individual"

Economically disadvantaged individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished financial capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."⁷⁷ Individuals claiming economic disadvantage must describe it in a personal statement and submit financial documentation.⁷⁸ The SBA will examine their personal income for the past three years, their personal net worth, and the fair market value of the assets they own.⁷⁹ However, principal ownership in a prospective or current 8(a) business is generally

⁶⁸ 13 C.F.R. §124.106(e).

⁶⁹ 13 C.F.R. §124.106(e)(1) & (3).

⁷⁰ 13 C.F.R. §124.103(a). *See also* 15 U.S.C. §637(a)(5).

⁷¹ 13 C.F.R. §124.103(b)(1). If required by the SBA, individuals claiming membership in these groups must demonstrate that they held themselves out and are recognized by others as members of the designated group(s). 13 C.F.R. §124.103(b)(2).

⁷² 13 C.F.R. §124.103(b)(3).

⁷³ 13 C.F.R. §124.103(c)(1).

⁷⁴ 13 C.F.R. §124.103(c)(2)(i)-(iii).

⁷⁵ 13 C.F.R. §124.103(c)(2)(iii).

⁷⁶ 13 C.F.R. §124.103(d)(4). Groups petitioning for recognition as socially disadvantaged do not always obtain it. Over the years, the SBA has rejected petitions from Hasidic Jews, women, disabled veterans, and Iranian-Americans. *See supra* note 31.

⁷⁷ 13 C.F.R. §124.104(a). *See also* 15 U.S.C. §637(a)(6)(A).

⁷⁸ 13 C.F.R. §124.104(b)(1).

⁷⁹ 13 C.F.R. §124.104(c). *See also* 15 U.S.C. §637(a)(6)(E)(i)-(ii).

excluded when calculating net worth, as is equity in individuals' primary residence.⁸⁰ For initial eligibility, applicants to the 8(a) Program must have a net worth of less than \$250,000.⁸¹ For continued eligibility, net worth must be less than \$750,000.⁸²

"Good character"

In determining whether an applicant to, or participant in, the 8(a) Program possesses "good character," the SBA looks for criminal conduct; violations of SBA regulations; current debarment or suspension from government contracting; managers or key employees who lack business integrity; and the knowing submission of false information to the SBA.⁸³

"Demonstrated potential for success"

For a firm to have demonstrated potential for success, it generally must have been in business in the field of its primary industry classification for at least two full years immediately prior to the date of its application to the 8(a) Program.⁸⁴ However, the SBA may grant a waiver allowing firms that have been in business for less than two years to enter the 8(a) Program when (1) the disadvantaged individuals upon whom eligibility is based have substantial business management experience; (2) the business has demonstrated the technical experience necessary to carry out its business plan with a substantial likelihood of success; (3) the firm has adequate capital to sustain its operations and carry out its business plan; (4) the firm has a record of successful performance on contracts in its primary field of operations; and (5) the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).⁸⁵

Set-Asides and Sole-Source Awards Under Section 8(a)

Section 8(a) of the Small Business Act authorizes agencies to award contracts for goods or services, or to perform construction work, to the SBA for subcontracting to small businesses participating in the 8(a) Program.⁸⁶ A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition.⁸⁷ Although the Competition in Contracting Act (CICA) generally requires that agencies obtain "full and open competition through the use of competitive procedures" when procuring goods or services, set-asides and sole-source awards are both

⁸⁰ 13 C.F.R. §124.104(c)(2).

⁸¹ *Id.*

⁸² *Id.*

⁸³ 13 C.F.R. §124.108(a)(1)-(5). For more on debarment and suspension, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel.

⁸⁴ 13 C.F.R. §124.107. Specifically, "[i]ncome tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) ... certification." 13 C.F.R. §124.107(a).

⁸⁵ 15 U.S.C. §637(a)(7)(A) ("reasonable prospects for success"); 13 C.F.R. §124.107(b)(1)(i)-(v).

⁸⁶ SBA may delegate the function of executing contracts to the procuring agencies and often does so. *See* 13 C.F.R. §124.501(a).

⁸⁷ Set-asides may be total or partial. *See* 48 C.F.R. §19.502-3(a).

permissible under CICA. In fact, an 8(a) set-aside is a recognized competitive procedure.⁸⁸ Agencies are effectively encouraged to subcontract through the 8(a) Program because there are government-wide and agency-specific goals regarding the percentage of procurement dollars awarded to "small disadvantaged businesses," among others.⁸⁹ Awards made via set-asides or on a sole-source basis count toward these goals,⁹⁰ and businesses participating in the 8(a) Program are considered small disadvantaged businesses.⁹¹

Discretion to Subcontract Through the 8(a) Program

There are few limits on agency discretion to subcontract through the 8(a) Program.⁹² However, the SBA is prohibited by regulation from accepting procurements for award under Section 8(a) when

1. the procuring agency issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a set-aside for small businesses not participating in the 8(a) Program prior to offering the requirement to SBA for award as an 8(a) contract;⁹³
2. the procuring agency competed the requirement among 8(a) firms prior to offering the requirement to SBA and receiving SBA's acceptance of it,⁹⁴ or
3. the SBA makes a written determination that "acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a

⁸⁸ 15 U.S.C. §644(a) (describing when set-asides for small businesses are permissible); 41 U.S.C. §3303(b) (CICA provision authorizing set-asides for small businesses); 48 C.F.R. §§6.203-6.206 (set-asides for small business generally, 8(a) small businesses, Historically Underutilized Business Zone (HUBZone) small businesses, and service-disabled veteran-owned small businesses). CICA authorizes competitions excluding all sources other than small businesses when such competitions assure that a "fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns." 41 U.S.C. §3104. CICA also permits sole-source awards when such awards are made pursuant to a procedure expressly authorized by statute, or when special circumstances exist (e.g., urgent and compelling circumstances). See 10 U.S.C. §2304(c)(1) (defense agency procurements) & 41 U.S.C. §§3301 & 3304(a)(3)(A) (civilian agency procurements). For more on competition in federal contracting, see CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M. Manuel.

⁸⁹ 15 U.S.C. §644(g)(1)-(2).

⁹⁰ They also count toward a separate goal for the percentage of federal procurement dollars awarded to small businesses generally. Currently, the government-wide goal is that 5% of all federal contract and subcontract dollars be spent with small disadvantaged businesses, including 8(a) businesses. Most agencies also have a 5% goal. See Small Business Goaling Report, *supra* note 7. The government-wide goal was met in FY2011, the most recent year for which information is available, when 7.67% of all federal procurement dollars was spent with small disadvantaged businesses. *Id.* Performance by the large procuring agencies varies, from 1.9% (Department of Energy) to 47.4% (SBA). *Id.*

⁹¹ See 13 C.F.R. §124.1002 (defining "small disadvantaged business").

⁹² See, e.g., AHNTECH, Inc., B-401092 (April 22, 2009) ("The [Small Business] Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program.").

⁹³ Even in this situation, SBA may accept the requirement under "extraordinary circumstances." 13 C.F.R. §124.504(a); Madison Servs., Inc., B-400615 (December 11, 2008) (finding that extraordinary circumstances existed when the agency's initial small business set-aside was erroneous and did not reflect its intentions).

⁹⁴ However, offers of requirements below the simplified acquisition threshold (generally \$150,000) are "assume[d]" to have been accepted at the time they are made, and the agency may proceed with the award if it does not receive a reply from SBA within two days of sending the offer. 13 C.F.R. §124.503(a)(4)(i). See also Eagle Collaborative Computing Servs., Inc., B-401043.3 (January 28, 2011) (finding that an agency properly awarded a sole-source contract valued below the simplified acquisition threshold even though SBA never accepted the requirements).

group of small businesses located in a specific geographical location, or other small business programs.”⁹⁵

Additionally, SBA is barred from awarding an 8(a) contract, either via a set-aside or on a sole-source basis, “if the price of the contract results in a cost to the contracting agency which exceeds a fair market price.”⁹⁶

Otherwise, agency officials may offer contracts to the SBA “in [their] discretion,” and the SBA may accept requirements for the 8(a) Program “whenever it determines such action is necessary or appropriate.”⁹⁷ The courts and the Government Accountability Office (GAO) will generally not hear protests of agencies’ determinations regarding whether to procure specific requirements through the 8(a) Program unless it can be shown that government officials acted in bad faith or contrary to federal law.⁹⁸

Monetary Thresholds and Subcontracting Mechanism Under 8(a)

Once the SBA has accepted a contract for the 8(a) Program, the contract is awarded either through a set-aside or on a sole-source basis, with the amount of the contract generally determining the acquisition method used, as **Figure 1** illustrates. When the anticipated total value of the contract, including any options, is less than \$4 million (\$6.5 million for manufacturing contracts), the contract is normally awarded without competition.⁹⁹ In contrast, when the anticipated value of the contract exceeds \$4 million (\$6.5 million for manufacturing contracts),

⁹⁵ 13 C.F.R. §124.504(a)-(c). The third provision applies only to preexisting requirements. It does not apply to new contracts, follow-on or renewal contracts, or procurements under \$150,000. *Id.* Also, under its regulations, SBA must presume an adverse impact when:

- (A) The small business concern has performed the specific requirement for at least 24 months;
- (B) The small business is performing the requirement at the time it is offered to the 8(a) ... program, or its performance of the requirement ended within 30 days of the procuring activity’s offer of the requirement to the 8(a) ... program; and
- (C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates).

13 C.F.R. §124.504(c)(1)(i)(A)-(C).

⁹⁶ 15 U.S.C. §637(a)(1)(A); 48 C.F.R. §19.806(b). Fair market price is estimated by looking at recent prices for similar items or work, in the case of repeat purchases, or by considering commercial prices for similar products or services, available in-house cost estimates, cost or pricing data submitted by the contractor, or data from other government agencies, in the case of new purchases. 15 U.S.C. §637(a)(3)(B)(i)-(iii); 48 C.F.R. §19.807(b) & (c).

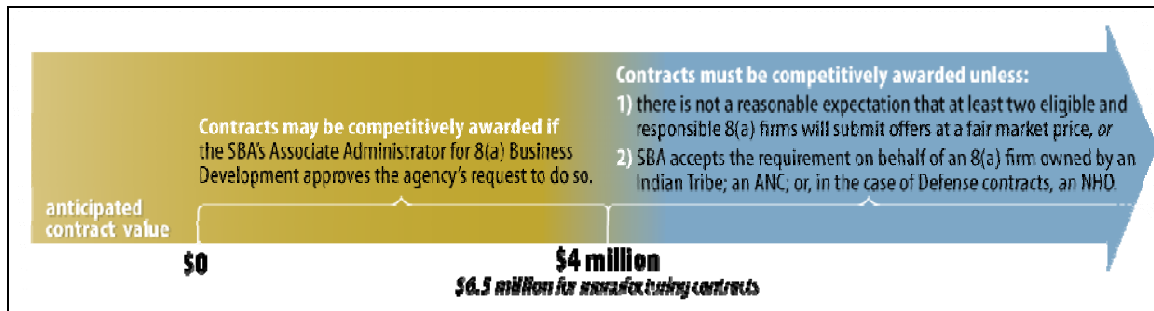
⁹⁷ 15 U.S.C. §637(a)(1)(A). *See also* Totolo v. United States, 87 Fed. Cl. 680, 695 (2009) (“The manner in which [an agency] assesses its needs is a business judgment and lies within its own discretionary domain.”); *JT Constr. Co., B-254257* (December 6, 1993) (stating that it is a business judgment, within the contracting officer’s discretion, to decide not to set aside a competition for small businesses). For a time in 2008-2010, the federal courts and the Government Accountability Office (GAO) found that set-asides for Historically Underutilized Business Zone (HUBZone) small businesses had “precedence” over set-asides for 8(a) firms. *See generally* CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by Kate M. Manuel. However, the Small Business Act was amended on September 27, 2010, to remove the language that formed the basis for these decisions. Small Business Jobs Act of 2010, P.L. 111-240, §1347, 124 Stat. 2546-47 (September 27, 2010).

⁹⁸ *See, e.g.*, *Rothe Computer Solutions, LLC, B-299452* (May 9, 2007).

⁹⁹ 15 U.S.C. §637(a)(16)(A). A noncompetitive award may be made under this authority so long as (1) the firm is determined to be a responsible contractor for performance of the contract; (2) the award of the contract would be consistent with the firm’s business plan; and (3) award of the contract would not result in the firm exceeding the percentage of revenue from 8(a) sources forecast in its annual business plan. 15 U.S.C. §637(a)(16)(A)(i)-(iii).

the contract generally must be awarded via a set-aside with competition limited to 8(a) firms so long as there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.¹⁰⁰ Sole-source awards of contracts valued at \$4 million (\$6.5 million or more for manufacturing contracts) may only be made when (1) there is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price, or (2) the SBA accepts the requirement on behalf of an 8(a) firm owned by an Indian tribe, an ANC or, in the case of Department of Defense contracts, an NHO.¹⁰¹ Requirements valued at more than \$4 million (\$6.5 million for manufacturing contracts) cannot be divided into several acquisitions at lesser amounts in order to make sole-source awards.¹⁰²

Figure I. Acquisition Methods at Various Price Thresholds



Source: Congressional Research Service.

Other Requirements

Other key requirements of the 8(a) Program include the following:

- **Inability to protest an 8(a) firm's eligibility for an award:** When the SBA makes or proposes an award to an 8(a) firm, that firm's eligibility for the award cannot be challenged or protested as part of the solicitation or proposed contract award. Instead, information concerning a firm's eligibility for the 8(a) Program must be submitted to SBA in accordance with separate requirements contained in 13 C.F.R. §124.517.¹⁰³
- **Maximum of nine years in the 8(a) Program:** Firms may participate in the 8(a) Program for no more than nine years from the date of their admission into the

¹⁰⁰ 15 U.S.C. §637(a)(1)(D)(ii); 48 C.F.R. §19.805-1(d). However, competitive awards for contracts whose anticipated value is less than \$4 million (\$6.5 million for manufacturing contracts) can be made with the approval of the SBA's Associate Administrator for 8(a) Business Development. 15 U.S.C. §637(a)(1)(D)(i)(I)-(II); 48 C.F.R. §19.805-1(d).

¹⁰¹ 48 C.F.R. §19.805-1(b)(1)-(2) (sole-source awards to tribally or ANC-owned firms); 48 C.F.R. §219.805-1(b)(2)(A)-(B) (sole-source awards to NHO-owned firms). Prior to enactment of the National Defense Authorization Act (NDAA) for FY2010, contracting officers making sole-source awards in reliance on the second exception did not have to justify such awards or obtain approval of them from higher-level agency officials. The NDAA changed this by requiring justifications, approvals, and notices for sole-source contracts in excess of \$20 million awarded under the authority of §8(a) similar to those required for sole-source contracts awarded under the general contracting authorities. Compare P.L. 111-84, §811, 123 Stat. 2405-06 (October 28, 2009) with 10 U.S.C. §2304(c) & (f) (procurements of defense agencies); 41 U.S.C. §3304(a) & (e) (procurements of civilian agencies).

¹⁰² 48 C.F.R. §19.805-1(c).

¹⁰³ 48 C.F.R. §19.805-2(d).

- Program, although they may be terminated or graduate from the program before nine years have passed.¹⁰⁴
- **One-time eligibility for the 8(a) Program:** Once a firm or a disadvantaged individual upon whom a firm's eligibility was based has exited the 8(a) Program after participating in it for any length of time, neither the firm nor the individual is generally eligible to participate in the 8(a) Program again.¹⁰⁵ When at least 50% of the assets of one firm are the same as those of another firm, the firms are considered identical for purposes of eligibility for the 8(a) Program.¹⁰⁶
 - **Limits on ownership of 8(a) firms by family members of current or former 8(a) firm owners:** Individuals generally may not use their disadvantaged status to qualify a firm for the 8(a) Program if the individual has an immediate family member who is using, or has used, his or her disadvantaged status to qualify a firm for the 8(a) Program.¹⁰⁷
 - **Limits on the amount of 8(a) contracts that a firm may receive:** 8(a) firms may generally not receive additional sole-source awards once they have received a combined total of competitive and sole-source awards "in excess of the dollar amount set forth in this section during its participation in the 8(a) ... program."¹⁰⁸ Additionally, 8(a) firms in the "transitional stage," or the last five years of participation, must achieve annual targets for the amount of revenues they receive from non-8(a) sources.¹⁰⁹ These targets increase over time, with firms required to attain 15% of their revenue from non-8(a) sources in the fifth year; 25% in the sixth year; 35% in the seventh year; 45% in the eighth year; and 55% in the ninth year.¹¹⁰ Firms that do not display the relevant percentages of revenue from non-8(a) sources are ineligible for sole-source 8(a) contracts "unless and until" they correct the situation.¹¹¹

¹⁰⁴ 15 U.S.C. §636(j)(10)(C)(i) (nine-year term); 15 U.S.C. §637(a)(9) (termination and early graduation); 13 C.F.R. §124.301 (exiting the 8(a) Program); 13 C.F.R. §124.302 (early graduation); 13 C.F.R. §124.303 (termination from the Program).

¹⁰⁵ 15 U.S.C. §636(j)(11)(B)-(C); 13 C.F.R. §124.108(b).

¹⁰⁶ 13 C.F.R. §124.108(b)(4).

¹⁰⁷ 13 C.F.R. §124.105(g)(1). SBA may waive this prohibition if the firms have no connections in terms of ownership, control, or contractual relationships. *Id.*

¹⁰⁸ 13 C.F.R. §124.519(a). Currently, this section does not specify an amount. However, prior to being amended in 2011, Subsections 124.519(a)(1) and (2) specified the applicable amounts as \$100 million, in the case of firms whose size is based on their number of employees, or an amount equivalent to the lesser of (1) \$100 million or (2) five times the size standard for the industry, in the case of firms whose size is based on their revenues. 13 C.F.R. §124.519(a)(1)-(2) (2010). The Administrator of the SBA may waive this requirement if the head of the procuring agency represents that a sole-source award to a firm is necessary "to achieve significant interests of the Government." 13 C.F.R. §124.519(e). Even after they have received a combined total of competitive and sole-source awards in excess of \$100 million, or other applicable amount, firms may still receive competitive contracts under the 8(a) Program. 13 C.F.R. §124.519(b).

¹⁰⁹ 15 U.S.C. §636(j)(10)(I)(i)-(iii); 13 C.F.R. §124.509(b)(1).

¹¹⁰ 13 C.F.R. §124.509(b)(2).

¹¹¹ 13 C.F.R. §124.509(d)(1). This prohibition may be waived when the Director of the Office of Business Development finds that denial of a sole-source contract would cause severe economic hardship for the firm, potentially jeopardizing its survival, or when extenuating circumstances beyond the firm's control caused it to miss its target. 13 C.F.R. §125.509(e).

- **Limitations on subcontracting:** Although not only under the authority of Section 8(a) of the Small Business Act or applicable only to 8(a) businesses, limitations on subcontracting require that small businesses receiving contracts under a set-aside perform minimum percentages of the contract work.¹¹² These percentages vary depending upon the type of the contract, with employees of the small business required to perform (1) at least 50% of the personnel costs of service contracts; (2) at least 50% of the costs of manufacturing (excluding materials) in supply contracts; (3) at least 15% of the costs of construction (excluding materials) in general construction contracts; and (4) at least 25% of the costs of construction (excluding materials) in "special trade" construction contracts.¹¹³

Requirements for Tribally, ANC-, NHO-, and CDC-Owned Firms

Tribes, ANCs, NHOs or CDCs themselves generally do not participate in the 8(a) Program. Rather, businesses that are at least 51% owned by such entities participate in the 8(a) Program,¹¹⁴ although the rules governing their participation are somewhat different from those for the 8(a) Program generally.¹¹⁵

Eligibility for the 8(a) Program

"Small"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be "small" under the SBA's size standards.¹¹⁶ However, certain affiliations with the owning entity or other business enterprises of that entity are excluded in size determinations *unless* the Administrator of Small Business determines that a small business owned by an Indian tribe, ANC, NHO, or CDC "[has] obtained, or [is] likely to obtain, a substantial unfair competitive advantage within an industry category" because of such exclusions.¹¹⁷ Other affiliations of small businesses owned by Indian tribes, ANCs, NHOs, or CDCs can count in size determinations, and ANC-owned firms, in particular, have been subjected to early graduation from the 8(a) Program because they exceeded the size standards.¹¹⁸

¹¹² 15 U.S.C. 637(a)(14)(A)-(B); 15 U.S.C. §644(o); 13 C.F.R. §125.6; 48 C.F.R. §52.219-14.

¹¹³ 13 C.F.R. §124.510 (limits on subcontracting for 8(a) firms); 13 C.F.R. §125.6(a)(1)-(4) (limits on subcontracting for small businesses generally).

¹¹⁴ 13 C.F.R. §124.109(c)(3)(i) (tribally and ANC-owned firms); 13 C.F.R. §124.110 (b) (NHO-owned firms); 13 C.F.R. §124.111(c) (CDC-owned firms).

¹¹⁵ 13 C.F.R. §§124.109-124.111.

¹¹⁶ 13 C.F.R. §124.109(c)(2)(i) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); 13 C.F.R. §124.111(c) (CDC-owned firms).

¹¹⁷ 13 C.F.R. §124.109(c)(2)(iii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); 13 C.F.R. §124.111(c) (CDC-owned firms). It is unclear how the language here, stating that "any other business enterprise owned by [an organization]" shall be excluded from the size determination, is to be reconciled with that in 13 C.F.R. §121.103(b)(2)(ii), which suggests that businesses owned and controlled by organizations could be found to be affiliates of the organization for reasons other than common ownership or management, or performance of common administrative services.

¹¹⁸ See, e.g., Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996) (rejecting a challenge to the size of an ANC-owned firm because its subcontractor performed less than 25% of the work on the contract and was not its affiliate); Gov't Accountability Office, Increased Used of Alaska Native Corporations' Special 8(a) Provisions Calls (continued...)

"Business"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be "businesses" under the SBA's definition.¹¹⁹ Although ANCs themselves may be for-profit or non-profit, ANC-owned businesses must be for-profit to participate in the 8(a) Program.¹²⁰

"Unconditionally owned and controlled"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be unconditionally owned and substantially controlled by the tribe, ANC, NHO, or CDC, respectively.¹²¹ However, under SBA regulations, tribally or ANC-owned firms may be managed by individuals who are not members of the tribe or Alaska Natives if the firm can demonstrate:

that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.¹²²

The rules governing NHO-owned firms do not address management of NHO-owned firms by persons who are not Native Hawaiians,¹²³ and although the general rules apply where no "special rules" exist,¹²⁴ it seems unlikely that NHO-owned firms are treated differently from tribally or ANC-owned firms in this regard. CDCs are to be managed and have their daily operations conducted by individuals with "managerial experience of an extent and complexity needed to run the [firm]."¹²⁵

(...continued)

for Tailored Oversight, GAO-06-399, at 29 (April 2006) (describing "early graduation" of ANC-owned 8(a) firms).

¹¹⁹ 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹²⁰ 13 C.F.R. §124.109(a)(3).

¹²¹ 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹²² 13 C.F.R. §124.109(c)(4)(B).

¹²³ See 13 C.F.R. §124.110(d) (stating only that "[a]n individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage").

¹²⁴ 13 C.F.R. §124.110(a) ("Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in [Section] 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in [Section] 124.101 through 124.108 and [Section] 124.112 to the extent that they are not inconsistent with this section.").

¹²⁵ 13 C.F.R. §124.111(b).

"Socially disadvantaged"

As owners of prospective or current 8(a) firms, Indian tribes, ANCs, NHOs, and CDCs are all presumed to be socially disadvantaged.¹²⁶

"Economically disadvantaged"

By statute, ANCs are deemed to be economically disadvantaged,¹²⁷ and CDCs are similarly presumed to be economically disadvantaged.¹²⁸ Indian tribes and NHOs, in contrast, must establish economic disadvantage at least once. Indian tribes must present data on, among other things, the number of tribe members; the tribal unemployment rate; the per capita income of tribe members; the percentage of the local Indian population above the poverty level; the tribe's access to capital; the tribe's assets as disclosed in current financial statements; and all businesses wholly or partially owned by tribal enterprises or affiliates, as well as their primary industry classification.¹²⁹ However, once a tribe has established that it is economically disadvantaged for purposes of one 8(a) business, it need not reestablish economic disadvantage in order to have other businesses certified for the 8(a) Program *unless* the Director of the Office of Business Development requires it to do so.¹³⁰

When determining whether an NHO is economically disadvantaged, SBA will consider "the individual economic status of NHO's members," the majority of whom "must meet the same initial eligibility economic disadvantaged thresholds as individually-owned 8(a) applicants."¹³¹ Specifically:

For the first 8(a) applicant owned by a particular NHO, individual NHO members must meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants. For any additional 8(a) applicant owned by the NHO, individual NHO members must meet the economic disadvantage thresholds for continued 8(a) eligibility.¹³²

¹²⁶ 13 C.F.R. §124.109(b)(1) (tribally and ANC-owned firms); 15 U.S.C. §637(a)(4)(A)(i)(II) (NHO-owned firms); Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 ("A Community Development Corporation (CDC) is considered to be a socially and economically disadvantaged entity if the parent CDC is a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, et seq."). SBA's authority to designate CDCs as socially and economically disadvantaged derives from 42 U.S.C. §9815(a)(2). *See* 42 U.S.C. §9815(a)(2) ("Not later than 90 days after August 13, 1981, the Administrator of the Small Business Administration, after consultation with the Secretary, shall promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under §637(a) of title 15.").

¹²⁷ 43 U.S.C. §1626(e)(1) ("For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors."); 13 C.F.R. §124.109(a)(2) (same).

¹²⁸ *See* Small Disadvantaged Business Certification Application, *supra* note 125.

¹²⁹ 15 U.S.C. §637(a)(6)(A); 13 C.F.R. §124.109(b)(2)(i)-(vii).

¹³⁰ 13 C.F.R. §124.109(b).

¹³¹ 13 C.F.R. §124.110(c)(1).

¹³² *Id.* If the NHO has no members, then a majority of the members of the board of directors must qualify as economically disadvantaged.

"Good character"

When an organization owns an actual or prospective 8(a) firm, all members, officers, or employees of that organization are generally not required to show good character. The regulations governing tribally and ANC-owned firms explicitly address the issue, stating that the "good character" requirement applies only to officers or directors of the firm, or shareholders owning more than a 20% interest.¹³³ NHO-owned firms may be subject to the same requirements in practice.¹³⁴ With CDC-owned firms, the firm itself and "all of its principals" must have good character.¹³⁵

"Demonstrated potential for success"

Firms owned by ANCs, Indian tribes, NHOs, and CDCs may evidence "potential for success" in several ways, including by demonstrating that:

1. the firm has been in business for at least two years, as shown by individual or consolidated income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the firm seeks certification;
2. the individuals who will manage and control the daily operations of the firm have substantial technical and management experience; the firm has a record of successful performance on government or other contracts in its primary industry category; and the firm has adequate capital to sustain its operations and carry out its business plan; or
3. the owner-group has made a firm written commitment to support the operations of the firm and has the financial ability to do so.¹³⁶

The first of these ways for demonstrating potential for success is the same for individually owned firms,¹³⁷ and the second arguably corresponds to the circumstances in which SBA may waive the requirement that individually owned firms have been in business for at least two years.¹³⁸ There is no equivalent to the third way for individually owned firms, and some commentators have suggested that this provision could "benefit ANCs by allowing more expeditious and effortless access to 8(a) contracts for new concerns without having to staff new subsidiaries with experienced management."¹³⁹

¹³³ 13 C.F.R. §124.109(c)(7)(ii).

¹³⁴ See *supra* note 120 and accompanying text.

¹³⁵ 13 C.F.R. §124.111(g).

¹³⁶ 13 C.F.R. §124.109(c)(6)(i)-(iii) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(g)(1)-(3) (NHO-owned firms); 13 C.F.R. §124.111(f)(1)-(3) (CDC-owned firms).

¹³⁷ See *supra* note 84 and accompanying text.

¹³⁸ See *supra* note 85 and accompanying text.

¹³⁹ Daniel K. Oakes, *Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences*, 40 *Pub. Cont. L.J.* 777 (2011).

Report of Benefits for Firms Owned By ANCs, Indian Tribes, NHOs, and CDCs

Although implementation of this requirement has been delayed,¹⁴⁰ 8(a) firms owned by ANCs, Indian tribes, NHOs, and CDCs must submit information annually to the SBA showing:

how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) ... program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.¹⁴¹

Set-Asides and Sole-Source Awards

Like other participants in the 8(a) Program, firms owned by Indian tribes, ANCs, NHOs, and CDCs are eligible for 8(a) set-asides and may receive sole-source awards valued at less than \$4 million (\$6.5 million for manufacturing contracts). However, firms owned by Indian tribes and ANCs can also receive sole-source awards in excess of \$4 million (\$6.5 million for manufacturing contracts) even when contracting officers reasonably expect that that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.¹⁴² NHO-owned firms may receive sole-source awards from the Department of Defense under the same conditions.¹⁴³

Other Requirements

Firms owned by Indian tribes, ANCs, NHOs, and CDCs are governed by the same regulations as other 8(a) firms where certain of the "other requirements" are involved, including (1) inability to protest an 8(a) firm's eligibility for an award;¹⁴⁴ (2) maximum of nine years in the 8(a) Program

¹⁴⁰ Regulations promulgated by SBA in February 2011 provided that this reporting requirement would be effective "as of September 9, 2011, unless SBA further delays implementation through a Notice in the Federal Register." Small Bus. Admin., Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations: Final Rule, 76 *Federal Register* 8222 (February 11, 2011). SBA appears to have delayed reporting through three such notices, two announcing tribal consultations about the reporting requirements, and a third announcing SBA's intent to request approval of an information collection in accordance with the Paperwork Reduction Act of 1995. See Small Bus. Admin., 60 Day Notice and Request for Comments, 76 *Federal Register* 63983 (October 14, 2011); Small Bus. Admin., Notice of Tribal Consultations, 76 *Federal Register* 27859 (May 13, 2011); Small Bus. Admin., Notice of Tribal Consultations, 76 *Federal Register* 12273 (March 7, 2011).

¹⁴¹ 13 C.F.R. §124.604.

¹⁴² An Act To Amend the Small Business Act To Reform the Capital Ownership Development Program, and for Other Purposes; P.L. 100-656, §602(a), 102 Stat. 3887-88 (November 15, 1988) (codified at 15 U.S.C. §637 note); 48 C.F.R. §19.805-1(b)(2).

¹⁴³ The authority for DOD to make sole-source awards to NHO-owned firms of contracts valued at more than \$4 million (\$6.5 million for manufacturing contracts) even if contracting officers reasonably expect that offers will be received from at least two responsible small businesses existed on a temporary basis in 2004-2006 and became permanent in 2006. See Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, P.L. 109-148, §8020, 119 Stat. 2702-03 (December 30, 2005) ("[Provided] [t]hat, during the current fiscal year and hereafter, businesses certified as 8(a) by the Small Business Administration pursuant to section 8(a)(15) of Public Law 85-536, as amended, shall have the same status as other program participants under section 602 of P.L. 100-656 ... for purposes of contracting with agencies of the Department of Defense."); 48 C.F.R. §219.805-1(b)(2)(A)-(B).

¹⁴⁴ See *supra* note 102.

(for individual firms);¹⁴⁵ and (3) limits on subcontracting.¹⁴⁶ However, the requirements for such firms differ somewhat from those for other 8(a) firms where one-time eligibility for the 8(a) Program; limits on majority ownership of 8(a) firms; and limits on the amount of 8(a) contracts that a firm may receive are involved. Firms owned by Indian tribes, ANCs, NHOs, and CDCs may participate in the 8(a) Program only one time.¹⁴⁷ However, unlike the disadvantaged individuals upon whom other firms' eligibility for the 8(a) Program is based, Indian tribes, ANCs, NHOs, and CDCs may confer eligibility for the 8(a) Program upon firms on multiple occasions and for an indefinite period.¹⁴⁸ Additionally, although Indian tribes, ANCs, NHOs, and CDCs may not own 51% or more of a firm obtaining the majority of its revenues from the same "primary" industry in which another firm they own or owned currently operates or has operated within the past two years, there are no limits on the number of firms they may own that operate in other primary industries.¹⁴⁹ Moreover, Indian tribes, ANCs, NHOs, and CDCs may own multiple firms that earn less than 50% of their revenue in the same "secondary" industries.¹⁵⁰ Finally, firms owned by Indian tribes, ANCs, and NHOs may continue to receive additional sole-source awards even after they have received a combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. Section 124.519, while individually owned firms may not.¹⁵¹ However, firms owned by any of these four types of entities are subject to the same requirements regarding the percentages of revenue received from non-8(a) sources at various stages of their participation in the 8(a) Program as other 8(a) firms.¹⁵²

Constitutionality of the 8(a) Program

The 8(a) Program has periodically been challenged on the grounds that the presumption that members of certain racial and ethnic groups are disadvantaged violates the constitutional guarantee of equal protection. The outcomes in early challenges to the program varied, with some courts finding that the plaintiffs lacked standing to bring such challenges because they were not economically disadvantaged, or were otherwise ineligible for the program,¹⁵³ and other courts

¹⁴⁵ 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹⁴⁶ 15 U.S.C. §644(o); 13 C.F.R. §125.6; 48 C.F.R. §52.219-14.

¹⁴⁷ 13 C.F.R. §124.109(a) & (b) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(a) (NHO-owned firms); 13 C.F.R. §124.111(a) (CDC-owned firms).

¹⁴⁸ *Id.*; 15 U.S.C. §636(j)(11)(B)-(C).

¹⁴⁹ 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); 13 C.F.R. §124.111(d) (CDC-owned firms). These regulations also provide that an 8(a) firm owned by an ANC, Indian tribe, NHO, or CDC may not, within its first two years in the 8(a) Program, receive a sole-source contract that is a follow-on to an 8(a) contract currently performed by an 8(a) firm owned by that entity, or previously performed by an 8(a) firm owned by that entity that left the program within the past two years. *Id.* In addition, there are restrictions on the percentage of work that may be performed by any non-8(a) venturer(s) in joint ventures involving 8(a) firms. *See generally* 13 C.F.R. §124.513.

¹⁵⁰ 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); 13 C.F.R. §124.111(d) (CDC-owned firms).

¹⁵¹ 13 C.F.R. §124.519(a). *See supra* note 108.

¹⁵² 13 C.F.R. §124.509.

¹⁵³ *See, e.g., Ray Baillie Trash Hauling*, 477 F.3d at 710 ("The plaintiffs never applied for participation in the section 8(a) program. Furthermore, they do not even contend that they are socially or economically disadvantaged and therefore eligible for participation in the program."); *SRS Techs., Inc. v. U.S. Dep't of Defense*, No. 96-1484, 1997 (continued...)

finding that the program was unconstitutional as applied in specific cases.¹⁵⁴ Most recently, in *DynaLantic Corporation v. U.S. Department of Defense*, the U.S. District Court for the District of Columbia found that the 8(a) Program was not unconstitutional on its face because "breaking down barriers to minority business development created by discrimination" constituted a compelling government interest, and the government had a strong basis in evidence for concluding that race-based action was necessary to further this interest.¹⁵⁵ However, the court found that the program was unconstitutional as applied in the military simulation and training industry because the Department of Defense (DOD) conceded it had "no evidence of discrimination, either in the public or private sector, in the simulation and training industry."¹⁵⁶

Particularly in its rejection of the facial challenge to the 8(a) Program, the court emphasized certain aspects of the program's history and requirements when finding that the government had articulated a compelling interest for the program and had a strong basis in evidence for its actions. Specifically, the court rejected the plaintiff's assertion that the 8(a) Program was "not truly remedial," but rather favored "virtually all minority groups ... over the larger pool of citizens," because non-minority individuals may qualify for the program, and all 8(a) applicants must demonstrate economic disadvantage.¹⁵⁷ The court also noted that the history of the 8(a) program

(...continued)

U.S. App. LEXIS 10143 (4th Cir., May 6, 1997) ("SBA's requirement of economic disadvantage for entry into the 8(a) Program is a race-neutral criterion. It was by virtue of this race-neutral criterion that plaintiff failed to qualify for a contract award, and its standing to challenge the race-conscious criteria is therefore lacking."). *But see* C.S. McCrossan Constr. Co., Inc. v. Cook, No. 95-1345-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M., April 2, 1996) ("Although Defendants attempt to characterize this set-aside program as one based on size and economic status of the owner, the fact remains that 'economic disadvantage' requires a showing of 'social disadvantage' which then implicates the race-based challenge. ... Plaintiff is not seeking admission into the 8(a) program. It is challenging the government's preferential treatment towards 8(a) program participants in the bidding of the job order contract.").

¹⁵⁴ *See, e.g.,* Cortez III Service Corp. v. Nat'l Aeronautics & Space Admin., 950 F. Supp. 357, 361 (D.D.C. 1996) (finding that the 8(a) Program is facially constitutional, but that "agencies have a responsibility to decide whether there has been a history of discrimination in the particular industry at issue" prior to procuring requirements through the 8(a) Program); *Fordice Constr. Co. v. Marsh*, 773 F. Supp. 867 (S.D. Miss. 1990) ("The court ... finds that the United States Army Corps of Engineers failed to give consideration to the impact of a 100% set-aside upon non-§8(a) eligible contractors in the Vicksburg area.").

¹⁵⁵ No. 95-2301 (EGS), 2012 U.S. Dist. LEXIS 114807 (D.D.C., August 15, 2012), at *29, *90. If the 8(a) Program as it presently exists, with its presumption that minorities are socially disadvantaged, were ever found to be unconstitutional on its face, the program could potentially be reconstituted without the presumption. Such a program might require proof of actual social disadvantage from all applicants to the 8(a) Program, perhaps using the same three criteria currently used by individual applicants demonstrating personal social disadvantage. *See* 13 C.F.R. §124.103(c)(2) (standards of evidence for showing personal disadvantage). Alternatively, the 8(a) Program could potentially continue as a program for small businesses owned by Indian tribes, ANCs, NHOs, or CDCs because tribes and other entities are generally not seen as constituting racial groups. *Morton v. Mancari*, 417 U.S. 535, 548 (1973) (treating the category of "Native Americans" as a political class, not a racial one, and describing programs targeting Native Americans as "reasonably designed to further the cause of Indian self-government"). The presumption of social and/or economic disadvantage accorded to these groups would thus not implicate a racial classification and would probably be subject only to "rational basis" review. Rational basis review is characterized by deference to legislative judgment, and the party challenging a government program must show that it is not rationally related to a legitimate government interest. *See* *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁵⁶ *DynaLantic*, 2012 U.S. Dist. LEXIS 114807, at *72.

¹⁵⁷ *Id.* at *31-*32. The court also rejected *DynaLantic's* argument that the government may only seek to remedy discrimination by a government entity, or by private individuals directly using government funds to discriminate. The court viewed these arguments as foreclosed by prior decisions holding that, under the Fourteenth Amendment, the government may implement race-conscious programs "to prevent itself from acting as a 'passive participant' in private discrimination in the relevant industries or markets." *Id.* at 31 (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 492 (1989)).

prior to 1978 (when Congress expressly authorized set-asides for disadvantaged small businesses) had evidenced that race-neutral methods were insufficient to promote contracting with minority-owned small businesses.¹⁵⁸ The court further noted that the 8(a) Program was intended to be a business development program, not a means to “channel contracts” to minority firms;¹⁵⁹ that Section 8(a) of the Small Business Act expressly provides that awards may be made through the 8(a) Program only when SBA determines that “such action is necessary and appropriate”;¹⁶⁰ and that the act requires the President and SBA to report annually to Congress on the program, thereby ensuring that Congress has evidence as to whether there is a “continuing compelling need for the program.”¹⁶¹ Similarly, in finding that the program was narrowly tailored to meet the government’s interests, the court noted (1) that goals for contracting with small disadvantaged businesses are purely aspirational, and there are no penalties for failing to meet them;¹⁶² (2) the nine-year limits on program participation for individual owners and firms;¹⁶³ and (3) that SBA may not accept a requirement for the 8(a) Program if it determines that doing so will have a adverse effect on another small business or group of small businesses.¹⁶⁴ The court emphasized that the last two factors, in particular, helped ensure that race-conscious remedies do not “last longer than the discriminatory effects [they are] designed to eliminate,”¹⁶⁵ and “work the least harm possible to other innocent persons competing for the benefit.”¹⁶⁶

In contrast, in upholding the as-applied challenge, the court focused on the industry in which DOD had proposed using an 8(a) set-aside, rather than aspects of the 8(a) Program. The court characterized the military simulation and training industry as a “highly skilled” one,¹⁶⁷ and noted that the government had conceded there was no evidence of public or private sector discrimination in this industry.¹⁶⁸ The court further suggested that, with the requisite evidence, the government could use the 8(a) Program to make awards in the military simulation and training industry.¹⁶⁹ However, despite such caveats, the 8(a) Program would appear vulnerable to as-

¹⁵⁸ *Id.* at *40 (“Reports prepared by the GAO and investigations conducted by both the executive and legislative branches prior to the 1978 codification showed that the Section 8(a) program had fallen far short of its goal to develop businesses owned by disadvantaged individuals, and that one reason for this failure was that the program had no legislative basis.”).

¹⁵⁹ *Id.* at *43 (quoting H.Rept. 1714, 95th Cong., 2nd sess., at 22-23 (1978)).

¹⁶⁰ *Id.* at *33-34.

¹⁶¹ *Id.* at *48. *DynaLantic* had asserted that post-enactment evidence of discrimination should not be considered. However, the court concluded that it was proper to consider such evidence, particularly where the “statute is over thirty years old and the evidence used to justify Section 8(a) [at the time of its enactment] is stale for purposes of determining a compelling interest in the present.” *Id.*

¹⁶² *Id.* at *132-135.

¹⁶³ *Id.* at *137-140.

¹⁶⁴ *Id.* at *144-150.

¹⁶⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995).

¹⁶⁶ *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

¹⁶⁷ *DynaLantic*, 2012 U.S. Dist. LEXIS 114807, at *120.

¹⁶⁸ *Id.* at *72. The government attempted to assert that, “as a matter of law, [it] need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry.” *Id.* at *118. However, the court rejected this position as inconsistent with Supreme Court precedent, which it construed as making “clear that the government must provide evidence demonstrating there were *eligible minorities in the relevant market* ... that were denied entry or access notwithstanding their eligibility.” *Id.*

¹⁶⁹ *Id.* at *154. DOD, however, has responded to the *DynaLantic* decision by prohibiting the award of contracts for “military simulators or any services in the military simulator industry,” a prohibition that applies to “all future contract awards, including extensions of existing contracts or the exercise of options on existing contracts.” Dep’t of Defense, Office of the Under Secretary of Defense, Immediate Cessation of Small Business Development Program (8(a) (continued...))

applied challenges in the wake of the *DynaLantic* decision, particularly in other "highly skilled" industries where there could be questions about the availability of qualified minority contractors.¹⁷⁰ As-applied challenges to the 8(a) Program have succeed in the past, arguably without materially diminishing the efficacy of the program.¹⁷¹ The current situation could be different, though, in that competition for federal contracts seems likely to increase as federal procurement spending decreases due to budget cuts and, potentially, sequestration.¹⁷²

At least one other challenge to the 8(a) Program is also pending in the federal district court for the District of Columbia,¹⁷³ and new challenges could potentially be filed in other jurisdictions, including the U.S. Court of Federal Claims. Appeals from the Court of Federal Claims are heard by the U.S. Court of Appeals for the Federal Circuit, which, in its 2008 decision in *Rothe Development Corporation v. Department of Defense*, struck down a DOD contracting program that incorporated a similar presumption that minorities are disadvantaged.¹⁷⁴ The *Rothe* court applied what is arguably a more stringent approach to equal protection analysis—and, particularly, the evidence compiled by Congress—than that applied by the *DynaLantic* court, and it is unclear how the 8(a) Program would fare if reviewed in light of *Rothe*.¹⁷⁵

(...continued)

Program) Procurement Contracts for Military Simulators or Services in the Military Simulator Industry, August 22, 2012, available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA004988-12-DPAP.pdf>. Some commentators have criticized this decision, in part, on the grounds that it prohibits the procurement of goods or services in this industry, while the *DynaLantic* decision addressed only goods. See, e.g., National Minority Organizations Respond to Federal *DynaLantic Corp.* Decision, *PR Newswire*, August 31, 2012, available at <http://www.prnewswire.com/news-releases/national-minority-organizations-respond-to-federal-court-dynalantic-corp-decision-168192866.html>.

¹⁷⁰ See, e.g., Danielle Ivory, Minority Vendors Say Awards Program at Risk on U.S. Court Ruling, *Bloomberg Gov't*, September 13, 2012 (quoting Alan Chvotkin, counsel and executive vice president of the Professional Services Council, as saying that the *DynaLantic* ruling may "open the door to more lawsuits," and "[t]he implications across the government could be significant").

¹⁷¹ See *supra* note 153 and accompanying text.

¹⁷² See, e.g., Federal Spending Cuts Mean Fiercer Competition for Contractors and Higher Need for Market Research, According to US Federal Contractor Registration, *SFGate*, September 22, 2011, available at <http://www.sfgate.com/business/article/Federal-Spending-Cuts-Mean-Fiercer-Competition-2304840.php>.

¹⁷³ *Rothe Dev., Inc. v. Dep't of Defense*, No. 12-CV-744, Original Complaint (filed D.D.C., May 9, 2012).

¹⁷⁴ 545 F.3d 1023 (Fed. Cir. 2008). For more on the *Rothe* decision, see generally CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by Jody Feder and Kate M. Manuel.

¹⁷⁵ In particular, the *DynaLantic* court relied on the precedent of *United States v. Salerno* in requiring that a plaintiff in a facial challenge must establish "that no set of circumstances exists under which [Section 8(a)] would be valid." *DynaLantic*, 2012 U.S. Dist. LEXIS 114807, at *23 (quoting *Salerno*, 481 U.S. 739, 745 (1987)). The *Rothe* court, in contrast, declined to apply this requirement of *Salerno* to the facial challenge to the program it struck down. See *Rothe*, 545 F.3d at 1032.

Appendix. Comparison of the Requirements Pertaining to 8(a) Businesses Generally, Tribally Owned Businesses, ANC-Owned Businesses, and Others

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
"Small"	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) All affiliations count (13 C.F.R. §121.103)	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the tribe or tribal ownership, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the ANC or ownership by the ANC, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the NHO or ownership by the NHO, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.110(c))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the CDC or ownership by the CDC, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.111(c))
"Business"	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1)) Although ANC may be non-profit, ANC-owned firms must be for-profit to be eligible for 8(a) Program (13 C.F.R. §124.109(a)(3))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))
"Unconditionally owned and controlled"	At least 51% unconditionally and directly owned by one or more	At least 51% tribally owned (13 C.F.R. §124.109(b)) Management may be conducted by	At least 51% ANC-owned (13 C.F.R. §124.109(a)(3)) Management may be conducted by	At least 51% NHO-owned (13 C.F.R. §124.110(a)) Not explicitly	At least 51% CDC-owned (13 C.F.R. §124.111(a)) Management and daily business operations to

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
	disadvantaged individuals who are U.S. citizens (13 C.F.R. §124.105) Management and daily business operations must be conducted by one or more disadvantaged individuals (13 C.F.R. §124.106)	individuals who are not members of the tribe provided that the SBA determines that such management is necessary to assist the business's development, among other things (13 C.F.R. §124.109(c)(4)(B))	individuals who are not Alaska Natives provided that the SBA determines that such management is necessary to assist the business's development, among other things (13 C.F.R. §124.109(c)(4)(B))	addressed in regulation ^a	be conducted by individuals having managerial experience of an extent and complexity needed to run the firm (13 C.F.R. §124.111(b))
"Socially disadvantaged individual"	Members of designated groups presumed to be socially disadvantaged; other individuals may prove personal disadvantage by a preponderance of the evidence (13 C.F.R. §124.103)	Indian tribes presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	ANCs presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	NHOs presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	CDCs presumed to be socially disadvantaged (42 U.S.C. §9815(a)(2))
"Economically disadvantaged individual"	Financial information (e.g., personal income, personal net worth, fair market value of assets) must show diminished financial capital and credit opportunities (13 C.F.R. §124.104)	Tribe must prove economic disadvantage the first time a tribally owned firm applies to the 8(a) Program; thereafter, a tribe need only prove economic disadvantage at the request of the SBA (13 C.F.R. §124.109(b)(2))	Deemed to be economically disadvantaged (43 U.S.C. §1626(e); 13 C.F.R. §124.109(a)(2))	For first applicant to 8(a) Program, NHO members must meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants; for later applicants, NHO members must meet the economic disadvantage thresholds for continued 8(a) eligibility (13 C.F.R. §124.110(c)(1))	CDCs presumed to be economically disadvantaged (42 U.S.C. §9815(a)(2))

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
"Good character"	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all members of the tribe (13 C.F.R. §124.109(c)(7)(B)(ii))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all ANC shareholders (13 C.F.R. §124.109(c)(7)(B)(ii))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Regulations do not address to whom requirements apply ^a	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirements apply to the firm and "all its principals" (13 C.F.R. §124.111(g))
"Demonstrated potential for success"	Firm must generally have been in business in primary industry for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 5 conditions ^b (13 C.F.R. §124.107)	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or Tribe must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.109(c)(6)(i)-(iii))	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or ANC must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.109(c)(6)(i)-(iii))	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or NHO must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.110 (g)(1)-(3))	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or CDC must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.111 (f)(1)-(3))
Sole-source awards	With contracts valued at over \$4 million (\$6.5 million for manufacturing	Can be made with contracts valued at over \$4 million (\$6.5 million for manufacturing contracts) even if there is a reasonable	Can be made with contracts valued at over \$4 million (\$6.5 million for manufacturing contracts) even if there is a reasonable	Can be made with Department of Defense contracts valued at over \$4 million (\$6.5	With contracts valued at over \$4 million (\$6.5 million for manufacturing) contracts, sole-source awards permissible only if there is not a reasonable

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
	contracts), sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))	expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (15 U.S.C. §637(a)(1)(D)(i)-(ii); 48 C.F.R. §19.805-1(b)(1)-(2))	expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (15 U.S.C. §637(a)(1)(D)(i)-(ii); 48 C.F.R. §19.805-1(b)(1)-(2))	million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §219.805-1(b)(2)(A)-(B)). Otherwise cannot be made unless there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))	expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))
Inability to protest eligibility for award	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))
Maximum of nine years in the 8(a) Program	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)

Requirements	8(a) Businesses Generally	Tribally Owned 8(a) Businesses	ANC-Owned 8(a) Businesses	NHO-Owned 8(a) Businesses	CDC-Owned 8(a) Businesses
One-time eligibility for 8(a) Program	Applies to both disadvantaged owners and firms (13 C.F.R. §124.108(b))	Applies only to tribally owned firms, not tribes (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to ANC-owned firms, not ANCs (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to NHO-owned firms, not NHOs (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to CDC-owned firms, not CDCs (15 U.S.C. §636(j)(11)(B)-(C))
Limits on the amount of 8(a) contracts that a firm may receive	No source awards possible once the firm has received combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has received combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 not explicitly addressed in regulation Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))

Source: Congressional Research Service.

- a. The rules governing NHO- and/or CDC-owned firms do not address this issue, and although the general rules apply where no "special rules" exist, it seems unlikely that NHO- and/or CDC-owned firms are treated differently than tribally or ANC-owned firms in this regard.
- b. These criteria include (1) the management experience of the disadvantaged individual(s) upon whom eligibility is based; (2) the business's technical experience; (3) the firm's capital; (4) the firm's performance record on prior federal or other contracts in its primary field of operations; and (5) whether the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).

Author Contact Information

Kate M. Manuel
Legislative Attorney
kmanuel@crs.loc.gov, 7-4477

John R. Luckey
Legislative Attorney
jluckey@crs.loc.gov, 7-7897